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IN THE

SUPREME COURT OF THE UNITED STATES

No. 82-5074

DAVID BOVE, Appellant,

v.

THE STATE OF NEW JERSEY, Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS

The Appellee moves the Court to dismiss this appeal on the ground that no substantial question not previously decided by this Court has been raised.

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
STATE OF NEW JERSEY
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

MARK PAUL CRONIN
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION
P. O. BOX CN 086
TRENTON, NEW JERSEY 08625
(609) 984-2009

OF COUNSEL AND ON THE MOTION

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I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE.

Appellant claims that he was entitled to a jury trial on the question whether he was eligible for the imposition of an extended term of imprisonment as a persistent offender. Appellant was convicted of a crime of the third degree and a crime of the fourth degree. Under New Jersey law, the sentence for a third degree crime is between three and five years. However, a persistent offender, defined as a person with at least two adult convictions within the last ten years, is eligible to receive a sentence of up to ten years. Additionally, the court may fix a period of parole ineligibility. The statutes at issue are set forth below.

N.J. Stat. Ann. sec. 2C:43-6 provides:

> a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:
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> * * *
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> (3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between 3 years and 5 years;
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> * * *
>
> b. As part of a sentence for any crime where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsection a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term as set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

N.J. Stat. Ann. sec. 2C:43-7 provides for the imposition of the extended term as follows:

> a. In the cases designated in section 2C:44-3 or 2C:11-3, a person who has been convicted of a crime may be sentenced to an

extended term of imprisonment, as follows:

> (4) In the case of a crime of the third degree, for a term which shall be fixed by the court between 5 and 10 years;
>
> * * *
>
> b. As part of a sentence for an extended term and notwithstanding the provisions of 2C:43-9, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligible for parole or a term of 25 years during which time the defendant shall not be eligible for parole where the sentence imposed was life imprisonment provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

N.J. Stat. Ann. sec. 2C:44-3 provides the criteria for imposing an extended term:

> The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in this section. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in 2C:43-6c., the court shall sentence the defendant to an extended term as required by 2C:43-6c., and application by the prosecutor shall not be required. The finding of the court shall be incorporated in the record.
>
> a. The defendant is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was a least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.
>
> * * *

The procedure to be followed in imposing an extended term is set forth in N.J.Ct.R. 3:21-4(d):

> A motion pursuant to N.J.S.A. 2C:44-3 for the imposition of an extended term of imprisonment shall be filed with the court by the prosecuting attorney within 14 days of the entry of defendant's guilty plea or of the return of the verdict and a copy of the motion shall be served on defendant. For

good cause shown the court may extend the time for filing the motion. The sentence shall include a determination as to whether the defendant was convicted and sentenced to an extended term of imprisonment as provided in N.J.S.A. 2C:43-7, 2C:44-3 and 2C:44-6e, and the commitment or order of sentence which directs the defendant's confinement shall so specify.

II.

THE PROCEEDINGS BELOW.

On December 24, 1980, appellant was charged in Monmouth County Accusation No. 548-80 with theft, in violation of N.J. Stat. Ann. sec. 2C:20-3, a third-degree offense (count one) and with possession of a weapon (a knife), in violation of N.J. Stat.Ann. sec. 2C:39-5(d), a fourth-degree offense (count two).

On December 24, 1980, appellant appeared before the Honorable Donald J. Cunningham, J.S.C., waived indictment, and entered a retraxit plea of guilty to the two counts in the accusation. In return for this negotiated plea, the State agreed to make no recommendation as to sentence and that any sentences imposed on the two counts would run concurrently.

On February 27, 1981, appellant appeared before Judge Cunningham for sentencing. The State had discovered in the meantime that appellant was not Edward Rosenberg, as he had represented at the time of the plea, but David Bove, and that David Bove had a long criminal record, including two robbery convictions. Before sentencing, an amended bargain was negotiated whereby the plea would not be rescinded but the State would move for appellant to be sentenced to an extended term under the provisions of N.J. Stat. Ann. sec. 2C:43-7, N.J. Stat. Ann. sec. 2C:44-3, and N.J. Stat. Ann. sec. 2C:44-6. After hearing the defense, Judge Cunningham granted the motion. He sentenced appellant to ten years in New Jersey State Prison for theft and to a concurrent term of 18 months for possession of a knife and fixed a term of five years during which appellant would be ineligible for parole.

On March 24, 1981, appellant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. That court affirmed the conviction on February 23, 1982.

Appellant filed a notice of petition for certification to the New Jersey Supreme Court on March 17, 1982. A Notice of Appeal was filed on March 22, 1982. On May 26, 1982, the Supreme Court denied certification and dismissed the appeal. State v. Bove, 91 N.J. 216, 450 A. 2d 544 (1982). Appellant thereafter filed a notice of appeal to this Court, invoking the Court's jurisdiction pursuant to 28 U.S.C. sec. 1257(2).

III

STATEMENT OF THE CASE.

When appellant appeared before Judge Donald J. Cunningham in Monmouth County Superior Court on December 24, 1980, and entered retraxit pleas of guilty to an accusation of theft and possession of a weapon, he represented that his name was Edward Rosenberg, that he had been born and raised in Brooklyn, and that he had no prior record except for juvenile offenses. (Pa4; Pa7-8). Appellant admitted having entered a supermarket in Ocean Township on November 20, 1980, while intoxicated, intending to steal meat. He went to the check-out counter instead, ostensibly to buy a pack of gum. When the cashier opened the cash register to make change, appellant reached in, grabbed money and food stamps, and ran. He was tackled and arrested on the spot. (9a5-6). Defendant was carrying a knife with an eight-inch blade in his waistband. (PSR2).* All money and food stamps, a total of $654, was recovered. (PSR2A).

In return for appellant's guilty pleas and on the understanding that appellant had no prior adult record, the State promised to make no recommendation as to length of

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* "PSR" refers to the presentence report prepared in connection with appellant's sentencing.

sentence, to recommend that any sentences imposed run concurrently, and to move for dismissal of the municipal court complaint against appellant. (Pa4). Judge Cunningham expressly made no promise about the sentences he would impose. (Pa8). He ascertained that appellant understood the maximum penalty for theft was five years and for possession of a knife was 18 months. (Pa7).

During negotiations for the plea bargain and at the hearing on the plea, appellant was represented by counsel. Judge Cunningham ascertained that appellant was satisfied with his counsel, that appellant's plea was entered voluntarily, in full understanding of the charges against him and of the consequences of the plea, and that appellant was in fact guilty. (Pa8; Pa6-7).

Appellant returned for sentencing on February 27, 1981. In the interim, the State had ascertained appellant's true identity by its own investigation. Throughout his presentence investigation, appellant had insisted that he was Edward Rosenberg, with no prior record except juvenile offenses. Only at sentencing did appellant admit his true identity as David Bove, who was born and raised not in Brooklyn but locally, in Belmar, and whose prior record, including juvenile offenses, comprised eight arrests and six convictions, including two robbery convictions. (PSR1; PSR3 to PSR8; Pa21). At the time of his arrest on the present offense, appellant was on parole, transferred from New York on a robbery conviction. (PSR3).

After having ascertained appellant's true status, the State wished to rescind the plea bargain. However, appellant and the State negotiated a compromise by which the plea would be amended to allow the State to move for imposition of an extended term. (Pa15; Pa26). In return, appellant would still retain the benefit of the State's recommendation of concurrent

sentences on the two counts. The terms of the amended bargain were presented on the record to appellant at sentencing, and defense counsel reported that appellant did not object to the State's motion but requested that the court in its discretion deny the motion. (Pa17).* When the court addressed appellant, he agreed with his counsel's representations. (Pa10).

On the strength of these developments, the State moved for an extended term, a motion which defense counsel explicitly conceded to be unobjectionable. (Pa17; Pa21). After hearing the defense on the court's discretion to impose an extended term and a period of ineligibility for parole, Judge Cunningham granted the State's motion. (Pa20; Pa26). He sentenced defendant to concurrent terms of ten years and of 18 months in New Jersey State Prison and fixed a period of five years during which defendant would be ineligible for parole. (Pa26-27).

IV.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT AND, THUS, SHOULD BE DISMISSED.

A. Appellant Is Attempting To Raise An Issue Not Properly Presented To The State Courts.

Appellant contends that he is entitled to a jury trial on the question whether he is a persistent offender, as that term is defined in the New Jersey statute. N.J. Stat. Ann. sec. 2C:44-3(a) provides for a longer term of imprisonment if a person who is to be sentenced has been convicted of crimes on two prior occasions. Defendant was represented by appointed counsel designated by the Office of the Public Defender on appeal to the Superior Court of New Jersey, Appellate Division, and on petition for certification to the New Jersey Supreme

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* The court informed appellant that under the State's motion, the maximum sentence would be increased from five to ten years and that a minimum term of five years before parole eligibility could be imposed. (Pa18).

Court. Counsel filed a brief on behalf of appellant in the Appellate Division and a petition and supplemental petition in the Supreme Court. In none of these pleadings was it alleged that appellant's right to trial by jury had been violated. This claim first appeared in an appendix to a pro se supplemental letter which appellant sent to the Appellate Division some six months after the State of New Jersey had filed its responding brief in that court. Appellant also raised the claim in a pro se letter to the New Jersey Supreme Court forwarded after the filing of his petition for certification.

It is clear that the United States Supreme Court limits its consideration of cases brought before it by petition for certiorari or appeal to questions which properly arise in the record, Tyrell v. District of Columbia, 243 U.S. 1 (1917), and which were urged and briefed below. Jenkins v. Anderson, 447 U.S. 231, 233 n.1 (1980); United States v. Santana, 427 U.S. 38, 41 n.2 (1976); Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1970); Neely v. Ebry Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339 (1957); California v. Taylor, 353 U.S. 553, 557 n.21 (1954). Only in exceptional cases will this Court review issues not raised and briefed below. Youakim v. Miller, 425 U.S. 231 (1976); Vachon v. New Hampshire, 414 U.S. 478 (1974); Duignarn v. United States, 247 U.S. 195 (1926). For example, this Court has included issues which were not raised and briefed in lower courts in its policy to refrain from adjudicating constitutional claims whenever possible, see, e.g., Vachon v. New Hampshire, supra, at 479 n.3; Fry v. United States, 421 U.S. 542, 545 (1975), or where an indigent petitioner, who was not represented by counsel in his state court, appeals and raises new issues on certiorari. See e.g., Ballard v. United States, 352 U.S. 354, 359 (1956). Cf. Monks v. New Jersey, 398 U.S. 71 (1970).

The State submits that appellant's claim does not present any exceptional situation warranting consideration by this Court of these issues raised for the first time. Appellant was represented by competent counsel, who declined to litigate the jury issue at trial, in the Appellate Division, or even in the New Jersey Supreme Court after appellant submitted his first pro se letter. There is no procedure whereby the pro se letters could have been filed by the appellate courts. New Jersey court rules permit the filing of an appellant's brief, a responding brief and, within 10 days, a reply brief. No other briefs may be filed without leave of court. N.J.Ct.R. 2:6-11. No such leave was sought in this case. Moreover, the pro se letter could not be deemed a reply brief, apart from its untimeliness, because New Jersey practice does not allow the filing of a reply brief which adds issues not theretofore raised. State v. Smith, 55 N.J. 476, 488, 262 A.2d 868, 874 (1970). For these reasons, the State has never briefed the issue now raised by appellant in this Court.

Further, examination of the opinion of the Appellate Division reveals that it did not consider the issue. That court listed the issues raised by appellant as "...(1) the sentence violated the plea agreement; (2) the sentence should be reduced based on N.J.S.A. 2C:44-7 [which merely confers the power to review sentences on the appellate courts]; and (3) he was not informed that an extended term or parole ineligibility could be imposed." (Pa49-50). The opinion indicates that it considered the arguments advanced by appellant, "... including the pro se letter brief. ..." But it must be noted that the pro se letter does not, itself, contain any legal argument. Rather, appellant complains to the court that he had asked his lawyer to raise various points but that the attorney did not. (Pa31). Appended to the letter was a lengthy research memorandum, which included a discussion of the right to jury trial when an extended term is

imposed. (Pa33-44).* Thus, it is clear that the supplemental letter itself included no legal argument and that the Appellate Division never considered appellant's belated claim.

Similarly, appellant's supplemental letter to the New Jersey Supreme Court could not have been filed or considered by the court. N.J.Ct.R. 2:12-3 provides for the filing of a notice of petition for certification; N.J.Ct.R. 2:12-7 describes the petition itself. There is no other provision for the filing of supplemental documents. The record on petition for certification consists only of the briefs, appendices and transcripts filed in the Appellate Division and the opinion of the Appellate Division. N.J. Ct.R. 2:12-6. Further, the New Jersey Supreme Court will not consider issues raised for the first time in that court. Farley v. $168,400.97, 55 N.J. 31, 46, 259 A.2d 201, 209 (1969).

From the foregoing discussion it is manifest that the claim that appellant was entitled to a jury trial was not raised in the state trial court, Appellate Division or Supreme Court. It has never been addressed by the State nor by the courts of New Jersey. We urge, therefore, that this Court dismiss the appeal and decline to consider the issue as a matter of initial impression.

B. There Is No Due Procees Right To Jury Trial Of A Motion To Impose An Extended Term.

Should this Court determine to review the merits of appellant's claim notwithstanding his failure to properly present it to the state courts, the State of New Jersey submits that the appeal should be dismissed for want of a substantial

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* Appellant does not include the entire appendix to the letter in his appendix to the brief filed in this Count. The first page of the appendix to the letter concerning jury trial is, however, marked "Dall," clearly indicating that it is not the first page in the original. Appellant deleted several pages of largely irrelevant case notes on unrelated topics, as well as the cover letter to his attorney which accompanied the notes.

federal question. Appellant contends that he is entitled to have a jury determine whether he is a persistent offender. The State submits that New Jersey has afforded appellant all of the procedural safeguards to which he is entitled, and that he has no right to jury trial at a sentencing proceeding.

Due process "is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In the context of sentencing, this Court held in Williams v. New York, 337 U.S. 241, 251 (1949):

> The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts - state and federal - from making progressive efforts to improve the administration of criminal justice.

Subsequently, this Court has defined the due process requirements in habitual offender proceedings, those cases where the convicted defendant is exposed to an increased term beyond the normal maximum sentence for that crime due to his prior record. Thus, it has been held that the defendant is entitled to be represented by retained counsel, Chandler v. Fretag, 348 U.S. 3 (1954), or court-appointed counsel, Chewning v. Cunningham, 368 U.S. 443 (1962), and to notice of that which the prosecution alleges qualifies the defendant for the increased penalty. Oyler v. Boles, 368 U.S. 448 (1962).

Some five years after the decisions in Chewning and Oyler, this Court considered what procedural safeguards were due a Colorado defendant who was convicted of a sexual offense. The maximum penalty for the crime was 10 years but the defendant could be sentenced to an indeterminate term of from one day to life, based upon certain factual determinations. The Sex Offenders Act was invoked without notice and full hearing. Specht v. Patterson, 386 U.S. 605, 607 (1967). This Court reaffirmed the holding of Williams v. New York, supra, but

declined to extend it to the Colorado scheme because that statute

> does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact ... that was not an ingredient of the offense charged. [386 U.S. at 608].

Because this Court found that invocation of the Colorado Sex Offenders Act meant the "making of a new charge leading to criminal punishment," procedural due process was found to be required.

But Specht does not require the grafting of all due process rights afforded a defendant in a criminal trial onto the sentencing process. This is made clear in this Court's later decisions concerning the Florida capital punishment statute. That statute allows a jury to render an advisory verdict on the death penalty, but the trial judge ultimately imposes sentence. In Gardner v. Florida, 450 U.S. 349, 358 (1977), Justice Stevens wrote, "... it is not clear that the sentencing process ... must satisfy the requirements of the Due Process Clause." But, the Court elaborated:

> The fact that due process applies does not, of course, implicate the entire panoply of criminal trial procedural rights.
>
> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands .... Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrisey v. Brewer, 408 U.S. 471, 481 .... [430 U.S. at 358, n.9].

In Proffit v. Florida, 428 U.S. 242, 252-253 (1976), Justice Powell wrote:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, ... but it has

> never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

It is thus seen that this Court has never held that a defendant has a right to jury trial in the application of a recidivist statute. In fact, in the analogous area of capital sentencing, where certain specific aggravating factors must be found to exist, this Court has held that there is no right to jury trial.

The precise scope of the rights which must be afforded to a defendant was defined in this language from Specht v. Patterson:

> Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. [386 U.S. at 610].

Those rights prescribed in Specht are afforded every criminal defendant in New Jersey. In particular, the prosecutor must give notice that an extended term is being sought by making a motion. N.J. Stat. Ann. sec. 2C:44-3. This motion must be made within 14 days of the guilty verdict or the defendant's guilty plea. N.J.Ct.R. 3:21-4(d). It is mandatory that the probation department prepare a presentence report and that the report be furnished to the defendant. N.J.Ct.R. 3:21-2(a). Before sentence is imposed, the court must address the defendant personally and give him the opportunity to speak, either personally or through his attorney, and present any information in mitigation of punishment. N.J.Ct.R. 3:21-4(b). The court is required to indicate whether an extended term is being imposed, N.J.Ct.R. 3:21-4(d), and to state its reasons for imposing

sentence. N.J.Ct.R. 3:21-4(e).

All of the procedures were followed in this case, and appellant does not contend otherwise. These procedures assure that appellant received a fair hearing at which he could effectively contest the applicability of the extended term provisions of N.J. Stat. Ann. sec 2C:44-3. The Fourteenth Amendment requires no more.

C. Appellant Waived Any Right To Jury Trial He May Have Had.

Even if appellant had presented his claim of error to the state courts and even if there is a right to jury trial on a motion to impose an extended term, it is the position of the State of New Jersey that appellant waived his right to jury trial by admitting, in court, that he was eligible for an extended term. At the sentencing hearing, defense counsel stated the following with respect to the motion to impose an extended term:

> Your Honor, at this time the defendant does not object to the application of the Prosecutor's Office both as to the time in which the application is being made in light of the circumstances of this case, and in the substance of the application; although we do wish to be heard on the Court's discretion in imposing an extended term as well as the Court's discretion in setting a minimum parole date under the new Code. [Pal7].
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> * * *
>
> What I'm saying, we do not object to an extended term being imposed on the Prosecutor's motion, but Your Honor under the Statute, it's not mandatory upon the Prosecutor's motion. [Pal8].
>
> * * *
>
> So at this point we're talking about a five to ten year term with a presumptive under the Code of seven years and with the exposure that should Your Honor so decide, as opposed to a seven year presumptive and let the chips fall where they may in terms of the classification and corrections, for Your Honor to impose a minimum parole date, we would strongly object to; but that would be heard in the normal course of sentencing. [Pal9].

Counsel also conceded appellant's prior record (Pa21), as well as the fact that appellant lied about his identity to avoid imprisonment. (Pa20-21).

In Oyler v. Boles, 368 U.S. 448 (1962), this Court considered the constitutionality of a West Virginia statute that imposed increased penalties upon recidivists. It was held that a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge. 318 U.S. at 452. In considering the applicability of that holding to the criminal defendants in that case, however, this Court held:

> But the petitioners, who were represented by counsel, neither denied they were the persons named nor remained silent. Nor did they object or seek a continuance on the ground that they had not received adequate notice and needed more time to determine how to respond with respect to the issue of identity. Rather, both petitioners rendered further inquiry along this line unnecessary by their acknowledgments in open court that they were the same persons who had previously been convicted. In such circumstances the petitioners are in no position now to assert that they were not given a fair opportunity to respond to the allegations as to their identity. [368 U.S. at 453].

It is submitted that the present case is undistinguishable from Oyler v. Boles, supra. In both cases, the defendants admitted their prior records and eligibility for sentencing under state statutes providing enhanced penalties for repeat offenders. Just as that stipulation rendered any defect in the notice given inconsequential in Oyler, it renders nugatory appellant's belated claim in this case that he was entitled to a jury trial. Hence, this appeal should be dismissed for failure to present a substantial federal question.

V.

CONCLUSION

Appellee respectfully submits that the question upon which this cause depends is so insubstantial as not to need further argument, and appellee therefore moves the Court to dismiss the appeal. Regarding this appeal as improvidently taken and treating appellant's jurisdictional statement as a petition for writ of certiorari, 28 U.S.C. sec. 2103, it is respectfully submitted that certiorari should be denied for the reasons stated herein.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT

BY:
Mark Paul Cronin
Deputy Attorney General

MARK PAUL CRONIN
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE SECTION

OF COUNSEL AND ON THE MOTION

DATED: November 8, 1982